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This court holds that it was the evident intent of Congress in enacting the Civil Rights Act to provide for its uniform operation in all places in the States as well as the Territories within the jurisdiction of the United States, and that it was not the intent of Congress that the provisions of the statute should be applicable only to such places as are under the exclusive jurisdiction of the National Government. *Butts v. Merchants' Transportation Co.*, 126.

2. *Separableness of provisions; operation in places under exclusive jurisdiction of National Government.*

The provisions of the Civil Rights Act having been declared unconstitutional as to their operation within the States, *Civil Rights Cases*, 109 U. S. 3, they are not separable as to their operation in such places as are under the exclusive jurisdiction of the National Government and the statute is therefore unconstitutional in its entirety. (*The Trade Mark Cases*, 100 U. S. 82). *Ib.*

3. *Enforcement in one jurisdiction although invalid in another; remedial statutes distinguished.*

The enforcement of a remedial statute, such as the Employers' Liability Act, in Territories of the United States, although unconstitutional as to the States, is distinguishable from the similar enforcement of a highly penal statute such as the Civil Rights Act. *El Paso &c. Railway Co. v. Gutierrez*, 215 U. S. 87, distinguished. *Ib.*

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The commerce that is confined within one State, and does not affect other States, is reserved to the State. This reservation is only of

that power which is consistent with the grant to Congress. *The Minnesota Rate Cases*, 352.

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The paramount authority of Congress enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, Congress may displace local laws by substituting laws of its own. *The Minnesota Rate Cases*, 352.

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No civil action lies for a conspiracy, unless there be an overt act that results in damage to the plaintiff. *Nalle v. Oyster*, 165.

2. *Civil action for; overt act; what constitutes.*

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1. *Contract impairment; effect of municipal ordinance abrogating street rights granted to public service corporation.*

An ordinance requiring a telephone corporation to remove from the streets its poles and wires which had been placed there under a former ordinance granting permission so to do without specifying any period, or else pay a rental not prescribed in the original ordinance, *held* unconstitutional under the contract clause of the Federal Constitution. *Greenwood v. Freight Co.*, 105 U. S. 13, distinguished. *Owensboro v. Cumberland Telephone Co.*, 58.

2. *Contract impairment; municipal grants within protection against.*

There is a distinction between a definite grant for a period longer than the law of the State permits and an indefinite grant; while the former may be altogether void as an effort to obtain that which is illegal, the latter is simply limited in duration to the period established by law, and during that time it is protected from impairment by the contract clause of the Constitution of the United States. *Boise Water Co. v. Boise City*, 84.

3. *Contract impairment; effect of municipal ordinance imposing additional obligations on assignee of grantee of easement in streets.*

The municipal ordinance of a town in Idaho imposing additional obligations on a corporation holding by assignment an easement granted by a former municipal ordinance within fifty years for use of the streets for water mains *held* an unconstitutional impairment of the obligation of the contract of the former ordinance. *Ib.*

4. *Contract impairment; rights protected against; street rights granted to public service corporation.*

Rights acquired under an ordinance granting the right to a water company to lay and maintain pipes in the streets is a substantial property right, with all the attributes of property; and the obligation of the contract in the ordinance on which it is based is protected against impairment by the contract clause of the Constitution of United States. *Ib.*

5. *Contract impairment; rights protected against; street rights granted to public service corporation; status of successor.*

Where, under the statutes of the State, a corporation formed by consolidation of several previously existing corporations becomes by express terms vested with all the assets of such constituent corporations, rights in the streets under municipal ordinances pass to the new corporation, and such rights are protected against im-

pairment by the contract clause of the Federal Constitution.
Owensboro v. Cumberland Telephone Co., 58.

6. *Contract impairment; effect of municipal ordinance requiring electric company to remove wires and poles from streets.*

An ordinance, not based upon necessities of the municipality, requiring an electric light company to remove its poles and wires held, in this case, to be an arbitrary impairment of the contract of the original ordinance granting the right in perpetuity and therefore void because unconstitutional under the contract clause of the Constitution of the United States. *Old Colony Trust Co. v. Omaha*, 100.

7. *Contract impairment; effect of municipal ordinance requiring public service corporation to discontinue service theretofore acquiesced in by municipality.*

Acquiescence by the municipality in the extension of a franchise for electric light to distribution of electricity for power and heat evidenced, as in this case, by collection of taxes imposed on receipts therefrom and the purchase by the city of current for power, held, to entitle those who had advanced money on the security of the franchise to insist upon the recognition and continuation of the right of the corporation to supply electricity for power and heat, as well as light; and an ordinance requiring the corporation to discontinue such distribution of heat and power is void under the contract clause of the Constitution of the United States. *Ib.*

See MUNICIPAL CORPORATIONS, 12, 13.

8. *Due process of law defined.*

While the exact definition of the term "due process of law" may be uncertain, it is certain that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity to be heard. *Ochoa v. Hernandez*, 139.

9. *Due process of law; deprivation of property without; effect of military order reducing period for title to real estate in Porto Rico.*

The provision in the judicial order of General Henry published April 7, 1899, during the military occupation of Porto Rico by the United States, reducing the period for prescriptive title to real estate in that island from the periods previously established by law down to six years with retroactive effect and without any opportunity for third parties to be heard, amounted to a deprivation of property of the actual owners without due process of law and was beyond the

power of the Military Governor; nor was this provision ratified by any subsequent action of Congress. *Ib.*

10. *Due process of law; deprivation of property without; effect of shortening period for acquisition of title by prescription.*

To shorten the period for acquisition of title by prescription and give the order a retroactive effect so that the period has elapsed at the time the order is made without giving those who have interests in the property an opportunity to be heard and saving no existing rights, amounts to taking property without due process of law. *Ib.*

11. *Due process of law; deprivation of property without; power of commanding officer in territory occupied by military forces.*

Even if the commanding officer in territory occupied by military forces of the United States has all the legislative power as to such territory possessed by Congress, he is still subject, as Congress is, to the provisions of the Fifth Amendment and cannot by military orders deprive persons of their property without due process of law. *Ib.*

12. *Due process of law; deprivation of property without; effect of railroad rate regulation.*

To require a railroad company to charge such rates for transportation as prevent it from obtaining a reasonable return for the service rendered amounts to deprivation of property without due process of law in violation of the Fourteenth Amendment and is beyond the power of the State. (*Atlantic Coast Line v. North Carolina Commission*, 206 U. S. 1.) *Missouri Pacific Ry. Co. v. Tucker*, 340.

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CONTRACTS.

Interpretation by parties; influence of.

The practical interpretation of a contract by the parties thereto for a considerable period before a controversy arises is of great, if not

controlling, influence; and this rule is applicable in Nebraska as in the nature of estoppel. *Old Colony Trust Co. v. Omaha*, 100.

See CONSTITUTIONAL LAW, 1-7;

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CORPORATIONS.

1. *Public utility corporations; presumption as to inducement for investment of capital.*

There is a presumption that investments of large amounts of capital in a public utility enterprise will not be made on a franchise for necessary use of the streets which is a mere license revocable at will. *Boise Water Co. v. Boise City*, 84.

2. *Franchise to use streets; power to take for term longer than that of corporate existence.*

A corporation is capable of taking a grant of street rights of longer duration than its own corporate existence if the grant expressly inures to the benefit of the grantees, assigns and successors. *St. Clair Turnpike Co. v. Illinois*, 96 U. S. 63, distinguished. *Owensboro v. Cumberland Telephone Co.*, 58.

See CONSTITUTIONAL LAW, 3, 5;

MUNICIPAL CORPORATIONS.

COURTS.

1. *Disqualification of judge; application of § 21, Judicial Code.*

The proceeding to retire for personal bias or prejudice a trial judge of a United States court from further hearing a case of which he has jurisdiction had its origin in the new Judicial Code, § 21, and is only applicable in rare instances in which not merely adverse, but biased and prejudiced, rulings are shown and facts and reasons given. *Ex parte American Steel Barrel Co.*, 35.

2. *Disqualification of judge; application of § 21, Judicial Code.*

Section 21 of the Judicial Code is not intended as a means for a discontented litigant ousting a judge because of adverse rulings, or as a method of paralyzing the action of a judge who has heard the case by disqualifying him between the hearing and the determination of the matter heard. *Ib.*

3. *Disqualification of judge under § 21, Judicial Code; quare as to sufficiency of affidavit of bias.*

Quare and not decided whether under § 21, Judicial Code, any affidavit

of bias and prejudice is sufficient or whether the judge can pass upon its sufficiency. *Ib.*

4. *Functions of this court in respect of legislative judgment.*

This court does not sit as a board of review to substitute its judgment for that of the legislature or of the commission lawfully constituted by it, as to matters within the province of either. *The Minnesota Rate Cases*, 352.

5. *Conclusions of law; error to include in findings of fact.*

This court considers it a grave error for the court charged with the duty of making findings of fact to include mere conclusions of law. *Jackson v. United States*, 1.

See APPEAL AND ERROR; JURISDICTION;
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DISTRICT OF COLUMBIA.

1. *Bills of exceptions; law governing practice of.*

The practice of bills of exceptions is statutory under the Statute of Westminster, 2, 13 Edw. I, c. 31, which prevailed in Maryland and was continued in force in the District of Columbia by the act of March 3, 1901, except as superseded by the Code established by that act. *Nalle v. Oyster*, 165.

2. *Bills of exceptions; practice; effect of Code and rules of court; necessity for exception.*

This practice was not modified by the Code, nor has it been by any

rules of practice established under it; there is no provision giving the right to take exceptions on rulings other than those made in the course of the trial, except as based on the Statute of Westminster; nor does any rule of court require an exception to be taken in order to preserve rights of a plaintiff against whose declaration a demurrer has been sustained. *Ib.*

3. *Pleading; application of § 1533, Code.*

Section 1533 of the Code applies only where the demurrer has been overruled; it has no bearing upon a case where the demurrer has been sustained. *Ib.*

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See CONSTITUTIONAL LAW, 6, 7.

EQUAL PROTECTION OF THE LAW.

See RATE REGULATION, 24, 25, 26.

EQUITY.

1. *Nuisance; public; who may maintain action to abate.*

Although the nuisance may be a public one and others may be damaged thereby, one who shows that he suffers a special grievance not borne by the public, may maintain a separate action for equitable relief. *Arizona Copper Co. v. Gillespie*, 46.

2. *Nuisance; contamination of waters; injunction to abate properly granted.*

In this case *held*, that the contamination of waters in Arizona by a copper plant constituted a nuisance as to the lower appropriators and, under the circumstances, an injunction was properly granted, the Supreme Court of the Territory having provided in the decree that the defendant might have the injunction modified on constructing remedial works to prevent contamination. (*Georgia v. Tennessee Copper Co.*, 206 U. S. 230.) *Ib.*

3. *Nuisance; abatement of; power of equity.*

Where, as in this case, the record does not show the damage which the injunction might cause the defendant, but does show that the interests of complainant and others of his class might be irreparably injured by a continuance of the nuisance, equity may grant relief. *Ib.*

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Limitations on; effect of order beyond authority of person making it.

Where the limitations on a person exercising authority are notorious and are simply in accord with national and international law, there is no hardship in applying the rule that rights cannot be acquired under orders made by such person which are wholly beyond his authority. *Ochoa v. Hernandez*, 139.

See INTERSTATE COMMERCE, 2;
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INTERSTATE COMMERCE.

1. *Act to Regulate; scope of.*

Congress in the Act to Regulate Commerce expressly provided that the provisions of the act should not extend to transportation wholly within one State. *The Minnesota Rate Cases*, 352.

2. *Act to Regulate; functions of court as to.*

It is the function of the court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon. *Ib.*

3. *Carriers embraced by Act to Regulate; how determined.*

In terms the Act applies to all carriers engaged in the transportation of passengers or property by railroad, and the scope of the Act depends on the definition of the word "railroad" as used in 1887 when the Act was originally passed. *Omaha Street Ry. Co. v. Interstate Com. Comm.*, 324.

4. *Carriers embraced by Act to Regulate; street passenger railways not within.*

Street railways for passengers only, as they existed in 1887, were not within the contemplation of Congress in passing the Act to Regulate Commerce, such railroads are not subject to its provisions or under the jurisdiction of the Interstate Commerce Commission even though they carry passengers across the state line. *Ib.*

5. *Carriers embraced by Act to Regulate; quære as to effect of act of June 18, 1910.*

Quære to what extent since the passage of the act of June 18, 1910, interstate railways doing passenger, freight and express business are now under the jurisdiction of the Interstate Commerce Commission, and if so, to what extent. *Ib.*

6. *Car distribution; discrimination in; preliminary action by Commission prerequisite to resort to courts.*

Without preliminary action by the Interstate Commerce Commission declaring that the carrier had, by the rule adopted in regard to distribution of cars, discriminated against a shipper in such distribution, the Federal courts have no jurisdiction of a suit by such shipper for damages alleged to be occasioned by undue discrimination against him and undue preference in favor of his competitor. *Morrisdale Coal Co. v. Pennsylvania R. R. Co.*, 304.

7. *Car distribution; reasonableness for determination of Commission.*

The question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Interstate Commerce Commission. *Ib.*

8. *Car distribution; discrimination in; limitation of actions for.*

Where the alleged discriminations in distribution of cars occurred more than two years before its commencement, the action cannot be stayed to permit an application to the Interstate Commerce Commission as under the act of June 29, 1906, all of such claims are barred after two years. (*Southern Railway v. Tift*, 206 U. S. 434.) *Ib.*

9. *Constitutional provision; automatic operation to secure against state interference.*

Even without action by Congress, the commerce clause of the Constitution necessarily excludes the States from direct control of subjects embraced within the clause which are of such a nature that, if regulated at all, their regulation should be prescribed by a single authority. There is thus secured the essential immunity of interstate intercourse from the imposition by the States of direct burdens and restraints. *The Minnesota Rate Cases*. 352.

10. *Federal control to exclusion of state interference.*

The Federal Constitution gives Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the National interest may demand. *Ib.*

11. *Federal control over; effect of commingling interstate and intrastate operations.*

The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress over the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. *Ib.*

12. *Penal nature of Act to Regulate; measure of damage for private injury not determined by.*

While the Act to Regulate Commerce is in many respects highly penal there is no fixed measure of damages in favor of a shipper compelled to pay the published tariff rate while his favored competitors are given a lesser rate by means of rebates. Neither the American nor

English decisions are authority for such a rule as to the measure of damages. *Pennsylvania R. R. Co. v. International Coal Co.*, 184.

13. *Penal nature of Act to Regulate; measure of damage for private injury.*

The Act to Regulate Commerce imposes on the carrier heavy penalties for its violations payable to Government and independent of the amount of rebates paid, and is thus a terror to evil doers; but for private wrongs by which private injury is inflicted the compensation recoverable by the injured shipper is measured by the damages actually sustained and proved. *Ib.*

14. *Rates; when question as to, one for Commission and when one for courts.*

Under the Act to Regulate Commerce while reasonableness of rates and permissible discriminations based upon differences in conditions are administrative matters for the Commission, the courts have jurisdiction to determine whether differentials in rates can be allowed for the same commodity under similar conditions of traffic, on account of differences in the disposition of the commodity. *Ib.*

15. *Rates and allowances; Commission as tribunal to determine reasonableness.*

There is a necessity, which is recognized by the Act to Regulate Commerce, of having questions as to reasonableness of rates and allowances settled by a single tribunal in order to avoid the conflicting decisions which would result if several different tribunals could pass upon the same question; and the act itself has designated the Interstate Commerce Commission as that tribunal. *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 247.

16. *Rebates; effect of Hepburn Act on arrangements made prior thereto.*

A carrier can only charge the published rate for the same article and when collected cannot pay back any part thereof under any pretense, however equitable, to any shipper or to every shipper; and so held that carriers could not after the passage of the Hepburn Act continue to give rebates to shippers pursuant to arrangements made prior to the act on merchandise which the shippers had contracted to sell before that time. *Pennsylvania R. R. Co. v. International Coal Co.*, 184.

17. *Rebating; purchase of land by; prohibited.*

Carriers, whether saw-mill companies or railroads or both combined, cannot purchase land by rebating to the grantor a part of the

freight rate on interstate shipments over the road built on the right of way. *Fourche River Lumber Co. v. Bryant Lumber Co.*, 316.

18. *Rebating; purchase of land by; illegality.*

A rebate made for purchase of land is illegal even though much less than the value of the land acquired. *Ib.*

19. *Rebating; evasion of prohibitions against.*

The prohibitions of the Act to Regulate Commerce against rebates cannot be evaded by calling them differentials or concessions, nor by taking the money from a corporation that is the same as the rebating carrier. *Ib.*

20. *Services by shipper; recovery for discrimination resulting from unreasonable payment for; jurisdiction of courts.*

The courts have not jurisdiction of a suit brought by a shipper against a carrier for damages by reason of paying other shippers of similar goods an unreasonable amount for services in connection with such transportation unless and until there has been a finding by the Interstate Commerce Commission that the payments so made to the other shippers were unreasonably large. *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 247.

21. *Services of shipper; payment for; right of carrier as to.*

A carrier has the right under the Act to Regulate Commerce to pay shippers a reasonable allowance for services in connection with transportation of goods shipped by them, and the allowance paid must be treated by the courts as *prima facie* reasonable until the Interstate Commerce Commission has determined otherwise. *Ib.*

22. *Services of shipper; allowances for lateral hauling; jurisdiction to determine reasonableness.*

Allowances for lateral hauling may be lawfully paid, as they become unlawful only when unreasonable; whether unreasonable either past or future is a rate-making question over which the courts have no jurisdiction, even if the parties attempt to give it by consent. *Ib.*

23. *Services of shipper; allowances for lateral hauling; determination of reasonableness for Commission as prerequisite to resort to courts.*

This action, having been commenced without any application having been made to the Interstate Commerce Commission to declare unreasonable the allowances paid by the carrier for lateral hauling, the case must be remanded for dismissal, but the dismissal is

stayed to give plaintiff an opportunity to make such application with the right to the carrier to be heard on the defense of limitations as well as other defenses. *Ib.*

24. *Tariff; published; effect as statute.*

A published tariff, so long as it is in force, has the effect of a statute and is binding alike on carrier and shipper. *Pennsylvania R. R. Co. v. International Coal Co.*, 184.

25. *Tariff; published; departure from; liability of carrier to person injured thereby.*

While departure from a published tariff is forbidden by the Act to Regulate Commerce and by §§ 7 and 8 thereof, the carrier is liable to the person injured for the damages sustained, such damages must be proved and are not to be merely measured by the difference between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper. *Ib.*

26. *Tariff; discrimination in rates; jurisdiction of suit to recover damages resulting from; measure of damages.*

Pennsylvania Railroad Co. v. International Coal Co., ante, p. 511, followed to effect that the courts have jurisdiction of a case brought by a shipper against a carrier for the amount of damages actually sustained by him for charging him the full tariff when it was carrying the same goods the same distance for other shippers at lower rates but that such damages must be sustained by proof as to the amount thereof. *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 247.

See RATE REGULATION;

STATES, 2, 3;

STATUTES, A 2.

INTERSTATE COMMERCE COMMISSION.

See INTERSTATE COMMERCE, 4-8, 14, 15, 20, 21, 22.

JUDGMENTS AND DECREES.

See APPEAL AND ERROR;

PLEADING, 1;

JURISDICTION, A 1, B;

PRACTICE AND PROCEDURE, 3;

RES JUDICATA.

JUDICIAL CODE.

See APPEAL AND ERROR;

COURTS, 1, 2, 3;

MANDAMUS, 2.

JUDICIAL DISCRETION.

See PRACTICE AND PROCEDURE, 1.

JURISDICTION.

A. OF THIS COURT.

1. *Of appeal from Circuit Court of Appeals; when case not one arising under Constitution and judgment of that court final.*

Where diverse citizenship exists and the complainant plants its right to relief on the doctrine of estoppel, the case is not one arising under the Constitution of the United States, even though recovery might have been sought on the ground of impairment of the contract, and the judgment of the Circuit Court of Appeals is final. *Omaha Electric Co. v. Omaha*, 123.

2. *Of direct appeal under § 5 of Judiciary Act of 1891; scope of review.*

Where appellants' direct appeal to this court under § 5 of the Judiciary Act of 1891 is taken on the claim that the ordinance on which the Circuit Court based its decision is in contravention of the Constitution of the United States, this court has jurisdiction to review not only the constitutional question but every other question properly arising in the case including error assigned by the other party on its cross writ for failure to allow its counterclaim under the contract. *Boise Water Co. v. Boise City*, 84.

3. *Of direct appeal from Circuit Court; election to carry case to Circuit Court of Appeals.*

Where jurisdiction of the Circuit Court is invoked wholly on diverse citizenship but in the course of the case a constitutional question arises, the unsuccessful party may bring the case direct to this court under § 5 of the Judiciary Act of 1891 or, at his election, he may carry it to the Circuit Court of Appeals which may either certify the question to this court or decide it. *Boise Water Co. v. Boise City* (No. 2), 98.

4. *Of appeals from District Court of United States for Porto Rico; scope of review.*

Under § 35 of the Foraker Act, appeals from the District Court of the United States for Porto Rico are subject to the provisions applicable to appeals from the Supreme Courts of the Territories under the act of April 7, 1874, under which the jurisdiction of this court is confined, in a case where there are no errors assigned upon questions of evidence, to determining whether the findings of the

court below support the judgment. (*Rosaly v. Graham*, 227 U. S. 584.) *Ochoa v. Hernandez*, 139.

See APPEAL AND ERROR;

COURTS, 4;

JURISDICTION, B.

B. OF CIRCUIT COURT OF APPEALS.

Finality of judgment.

The Judiciary Act of 1891 does not contemplate two reviews in cases in which jurisdiction of the Circuit Court is invoked wholly on diverse citizenship even as to the constitutional questions which may arise, and the judgment of the Circuit Court of Appeals deciding such a case is final. *Boise Water Co. v. Boise City (No. 2)*, 98.

See JURISDICTION, A 1, 3.

C. OF CIRCUIT COURTS.

Sufficiency of involution of constitutional ground.

As a basis of jurisdiction of the Circuit Court it is not enough that recovery might be sought upon a constitutional ground; it must clearly appear that it is actually so sought. *Omaha Electric Co. v. Omaha*, 123.

D. OF FEDERAL COURTS GENERALLY.

Of action to determine constitutionality of state rate regulation; effect of substitution of rates.

Where the Federal court already has jurisdiction of an action to determine the constitutionality of a state statute fixing rates, that jurisdiction is not ousted by a substitution of rates by the legislature; because the State files a bill to enforce the new rates; the Federal court retains jurisdiction under a supplemental bill. *Missouri Rate Cases*, 474.

See INTERSTATE COMMERCE, 6.

E. OF INTERSTATE COMMERCE COMMISSION.

See INTERSTATE COMMERCE, 4-7.

F. GENERALLY.

See COURTS.

LAW GOVERNING.

See DISTRICT OF COLUMBIA; 1, 2.

LEGISLATIVE POWER.

See CIVIL RIGHTS ACT;
 LEVEES, 2;
 RATE REGULATION, 27.

LEVEES.

1. *Control by Congress; effect of creation of Mississippi River Commission.*

Congress did not, by the creation of the Mississippi River Commission, assume entire control of the levee work to the displacement of state or local authorities who continued to construct levees for protection from overflow which combined with those constructed by the United States for improvement of navigation, so that eventually a complete system would be evolved. *Jackson v. United States*, 1.

2. *Damage occasioned by construction of; liability of United States.*

The rule that the United States has plenary power to legislate for the benefit of navigation and is not liable for remote or consequential damages caused by works constructed to that end has already been directly applied to the work of the Mississippi River Commission. (*Bedford v. United States*, 192 U. S. 225.) *Ib.*

3. *Damage occasioned by construction of; liability of United States.*

Jackson v. United States, ante, p. 599, followed to effect that the United States is not liable for damages caused by overflow of lands in the Mississippi valley caused by the levees constructed by state and Federal authority for protection from overflow and improvement of navigation, and that such overflow does not amount to a taking of property within the Fifth Amendment. *Hughes v. United States*, 24.

4. *Act of officer as act of United States; liability of latter for act of former in destroying levee.*

The wrongful act of an officer of the United States to meet an emergency, such as dynamiting a levee to allow water interfering with other work under construction is not the act of the United States and does not amount to taking for public use the property overflowed as a result of the dynamiting. *Ib.*

5. *Overflow occasioned by; liability for damages suffered.*

Damages, if any, by overflowing adjacent lands, occasioned by the levee system of the Mississippi River Valley could only result from concurrent action of the United States, the States and their sub-

ordinate agencies and individuals all impelled by different considerations, but all working towards the common end of having an efficient and continuous line of levees. *Jackson v. United States*, 1.

6. *Overflows; liability of United States for damages occasioned by.*

The United States is not responsible for damages by overflow or for failure to construct additional levees along the Mississippi River Valley, so as to afford increased protection from increased overflow caused by the levees that were constructed by state and Federal authority at other points; nor do such damages amount to taking the land overflowed for public use within the meaning of the Fifth Amendment. *Ib.*

LIBEL.

1. *Malice; implication from publication; privileged communications; burden of proof.*

Ordinarily malice is to be implied from the mere publication of a libel, and justification or extenuation must proceed from the defendant; but where the communication is privileged; the burden is on the plaintiff to prove malice. (*White v. Nichols*, 3 How. 266.) *Nalle v. Oyster*, 165.

2. *Privileged communications; statement in pleading as.*

A statement as to the qualifications of a teacher in the public schools made by members of the Board of Education in their answer to a petition for mandamus to reinstate her after dismissal is privileged; and if made without malice and with probable cause is not actionable. *Ib.*

3. *Probable cause for statement on which action based; effect of prior judicial decision.*

Such a statement cannot be held in an action for libel to have been made without probable cause if the court has held in another proceeding that the defendants were justified in making it. *Ib.*

4. *Pleading; admissions by demurrer.*

Allegations of malice, falsehood and want of probable cause in issuing a libel are of fact and are necessarily admitted by a demurrer. *Ib.*

LICENSES.

See CORPORATIONS, 1;
MUNICIPAL CORPORATIONS.

LIMITATION OF ACTIONS.

See INTERSTATE COMMERCE, 8;
STATUTE OF LIMITATIONS.

LIQUIDATED DAMAGES.

See RATE REGULATION, 41, 42.

LOCAL LAW.

Arizona. Riparian rights (see Riparian Rights, 1, 2, 5). *Arizona Copper Co. v. Gillespie*, 46.

District of Columbia. Bills of exceptions; act of March 3, 1901, establishing Code (see District of Columbia). *Nalle v. Oyster*, 165. Code, § 1533 (see District of Columbia, 3). *Ib.*

Idaho. Grants to corporations, Rev. Stat., § 2710; Rev. Codes, § 2838 (see Municipal Corporations, 10). *Boise Water Co. v. Boise City*, 84.

Water companies; compensation for water furnished municipalities (see Municipal Corporations, 17). *Ib.*

Kansas. Rate regulation statute of 1905 (see Rate Regulation, 42). *Missouri Pacific Ry. Co. v. Tucker*, 340.

Kentucky. Municipal corporations; licenses in streets (see Municipal Corporations, 6). *Owensboro v. Cumberland Telephone Co.*, 58.

Minnesota. Rate regulation (see Rate Regulation, 8, 45). *Minnesota Rate Cases*, 352.

Missouri. Freight and passenger fare acts of 1907 (see Rate Regulation, 10, 11). *Missouri Rate Cases*, 474.

Nebraska. Municipal power to grant licenses in streets (see Municipal Corporations, 12). *Old Colony Trust Co. v. Omaha*, 100.

Porto Rico. Registry law (see Porto Rico, 1). *Ochoa v. Hernandez*, 139.

West Virginia. Rate regulation statute of 1907 (see Rate Regulation, 25). *Chesapeake & Ohio Ry. Co. v. Conley*, 513.

Generally. See Congress, Powers of.

INDEX.

MALICE.

See LIBEL, 1.

MANDAMUS.

1. *Availability of writ.*

The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy. *Ex parte American Steel Barrel Co.*, 35.

2. *Not available to correct mistake of circuit judge acting under § 14, Judicial Code.*

Where a senior circuit judge in designating under § 14 of the Judicial Code a judge to act in place of one retired under § 21 of the Judicial Code acts in the exercise of his legitimate jurisdiction, this court cannot correct a mistake, if he makes one, by the writ of mandamus. *Ib.*

MAXIMS.

See RIPARIAN RIGHTS, 5.

MEASURE OF DAMAGES.

See INTERSTATE COMMERCE, 12, 13, 25.

MILITARY OCCUPANCY.

See CONSTITUTIONAL LAW, 9, 11;
PORTO RICO, 2, 4.

MILITARY ORDERS.

See CONSTITUTIONAL LAW, 9, 11;
PORTO RICO, 2.

MISSISSIPPI RIVER COMMISSION.

See LEVEES, 1, 2.

MUNICIPAL CORPORATIONS.

1. *Character as instrumentality of State.*

Municipal corporations are mere emanations from the State, exercising such public power as the State chooses to grant. *Boise Water Co. v. Boise City*, 84.

2. *Contracts with; what constitute; power of State to relieve public service corporation from obligation imposed by general law.*

A statutory provision that all water companies must furnish free water to the municipalities in which they are situated does not constitute

a contract to which the municipalities are parties; it is within the power of the State to relieve the water companies of the obligation and permit them to furnish water at reasonable cost. *Ib.*

3. *Delegated powers; source of rights conferred on public service corporations.*

Rights conferred by a municipal ordinance on a corporation qualified to conduct a public business come from the State through delegated power to the city. *Owensboro v. Cumberland Telephone Co.*, 58.

4. *Grants by, of right to use streets; nature and extent of.*

A municipal ordinance granting to a corporation qualified to carry on a public business, such as a telephone system, the right to use the streets for that purpose, is more than a mere revocable license; it is the granting of a property right, assignable, taxable and alienable, an asset of value and a basis of credit. *Ib.*

5. *Grants by, of right to use streets; duration of.*

Such a grant is one of property rights in perpetuity unless limited in duration by the grant itself or by a limitation imposed by the general law of the State or by the corporate powers of the municipality. *Ib.*

6. *Grant by, to use streets; powers in Kentucky.*

The powers of municipalities of Kentucky to grant licenses in the streets for telephones were not limited in 1889 as to time; and, under a charter provision giving power to regulate streets and alleys, a municipality had ample power to grant a franchise to a telephone company to place and maintain poles and wires thereon. *Ib.*

7. *Grants of street rights; effect of reservation to alter or amend.*

A reservation to alter or amend in a municipal ordinance, granting rights in the streets to a corporation to carry on a public utility, as the necessities of the city demand, is simply a reservation of police control incidental to the unabridgeable police power and does not reserve a right to revoke or repeal the ordinance itself. *Ib.*

8. *Grants of street rights; power to destroy.*

While the power to destroy contract rights may be reserved by a municipality in the ordinance granting them, the reservation must be clear and explicit. *Ib.*

9. *Grants of franchises for public utilities; duration of.*

Where there is no limitation in the general law of the State, nor in the charter of the city, as to duration of franchises for public utilities in the streets, the grant of an easement for that purpose not specifying a period of duration, is in perpetuity. *Boise Water Co. v. Boise City*, 84.

10. *Grants of franchises for public utilities; duration of; quære as to application of local general law.*

Quære whether the limitation of fifty years in § 2710, Rev. Stat., and § 2838, Rev. Codes of Idaho, on grants to corporations applies to a grant made by a municipality to an individual and afterwards assigned to a corporation. *Ib.*

11. *Grants of easements in streets; duration under law of State.*

Where there is a limitation in the law of the State of duration for which easements in streets can be granted by municipalities, an easement granted for an indefinite period continues for the specified period. *Ib.*

12. *Grants of right to use streets; law of Nebraska; duration of licenses; contract impairment.*

Under the laws of Nebraska, as construed by the highest courts of that State, municipalities had the power in 1884 of granting licenses to use the streets for public business; and, in the absence of specific limitation of duration, such licenses were in perpetuity and conveyed rights of property within the protection of the contract clause of the Constitution of the United States. *Old Colony Trust Co. v. Omaha*, 100.

13. *Grants of right to use streets; application of state police power; impairment of rights.*

Such grants are subject to reasonable police power of the State and forfeitable for acts of abuse or non-user; but they cannot be taken away or impaired arbitrarily. *Ib.*

14. *Grants of use of streets; duration; franchise construed as to.*

A provision in an ordinance that the grantee of a franchise to use the streets of a municipality may be required to remove therefrom what it has placed therein under the franchise when necessity demands, *held*, in this case, not to be an intention to limit the franchise to the corporate existence of the grantee. *Ib.*

15. *Liability for use of commodity furnished after notice that payment therefor will be discontinued.*

A municipality, which continues to use water furnished by a water com-

pany after giving notice that it will pay no further bills for such water, is not relieved by such notice from the obligation to pay therefor according to the reasonable rates which have been fixed pursuant to statute. *Boise Water Co. v. Boise City*, 84.

16. *Powers; derivation of; effect of decisions of highest state court.*

A municipality, being a creature of the State, derives its powers from the laws thereof, and is within the influence of the decisions of the State's court of last resort. *Old Colony Trust Co. v. Omaha*, 100.

17. *Public utilities; compensation to which entitled at hands of municipality; local law of Idaho.*

A water company under the laws of the State of Idaho is entitled to compensation for water furnished and which it is ready to furnish to the municipality, even if the report of commissioners fixing reasonable rates in pursuance of the statute has not been adopted by municipal ordinance. *Boise Water Co. v. Boise City*, 84.

18. *State action in changing general law; right of municipality to object to.*

A municipality may not object to the State relieving a grantee of franchise rights from obligations formerly imposed by a general law of the State. *Ib.*

See CONSTITUTIONAL LAW, 1-7.

MUNICIPAL ORDINANCES.

See CONSTITUTIONAL LAW, 1-7;

MUNICIPAL CORPORATIONS, 3-8.

NAVIGATION.

See LEVEES, 2, 3.

NOTICE.

See MUNICIPAL CORPORATIONS, 15.

NUISANCE.

See EQUITY.

ORDINANCES.

See CONSTITUTIONAL LAW, 1-7;

MUNICIPAL CORPORATIONS.

PARTIES.

See EQUITY, 1.

PENAL STATUTES.

See CIVIL RIGHTS ACT, 3;

INTERSTATE COMMERCE, 12, 13.

PLEADING.

1. *Counts of declaration; effect of issue joined on demurrer to one of several counts.*

The issue joined upon a demurrer to one count of a declaration is legally distinct and separate from the issue joined upon a demurrer to another count; nothing can be imported from one count to the other, nor can a judgment be based upon surmise that a matter referred to in one count is the same as that referred to in another. *Nalle v. Oyster*, 165.

2. *Supplemental bill; allowance, in action to determine constitutionality of state rate regulation where statute repealed but penalties saved and other rates substituted.*

Where an act fixing rates and imposing penalties for violation is repealed by a subsequent act which saves the penalties and simply substitutes other rates, the essential features of a controversy involving the constitutionality of the statute are the same; and, under the circumstances of this case, a supplemental bill may be filed setting up the new and additional legislation and praying relief in regard thereto. *Missouri Rate Cases*, 474.

See DISTRICT OF COLUMBIA, 3;

LABEL, 2, 3, 4.

POLICE POWER.

See MUNICIPAL CORPORATIONS, 7;

STATES, 2.

PORTO RICO.

1. *Registry law; rights of third parties under.*

Under the registry law of Porto Rico rights of third parties were preserved and a mortgagee or grantee acquired no better right before the expiration of the period of prescription than the grantor, but took subject to the rights of infants who owned property the title to which had been fraudulently registered in the name of the grantor. *Ochoa v. Hernandez*, 139.

2. *Military government; limitation of; protection of property rights.*

During the entire period General Orders No. 101 relating to Cuba and reiterated *mutatis mutandi* as to Porto Rico by General Miles continued in force as the recognized declaration of principles by which

the Military Government was limited, and under this the Governor was without authority to make any order that would deprive any person of his property without due process of law. *Ib.*

3. *Provisional government; duration of.*

From the exchange of ratifications until Congress acted by the passage of the Foraker Act the provisional government established in Porto Rico continued as before the peace. *Ib.*

4. *Status during military occupancy.*

The status of Porto Rico during the military occupancy and before the exchange of ratifications of the treaty of peace, was the same as that of the Philippine Islands during the same period. *Ib.*

See CONSTITUTIONAL LAW, 9;
JURISDICTION, A 4.

PRACTICE AND PROCEDURE.

1. *Discretion of trial judge in matter of practice; non-interference with.*

Where the ends of justice are advanced and no substantial rights of the objectors are violated, this court will not interfere with the reasonable discretion of the trial judge in a matter of practice. *Missouri Rate Cases*, 474.

2. *Disposition of appeals in which stipulations to abide by action of courts in other suits.*

Stipulations having been made that these suits should abide by the order, judgment and decree entered in other suits no questions are presented for the consideration of this court by the records; and the appeals are dismissed. *Knott v. St. Louis Southwestern Ry.*, 509.

3. *Same; course of parties in lower court.*

Under such conditions the parties should apply to the court below in accordance with the stipulations to have decrees entered in these suits similar to those which this court has directed to be entered in the suits to which the stipulations refer. *Ib.*

4. *Controlling effect of state court's construction of syllabus of officially reported decision of state court.*

In the absence of any controlling statute, this court will not give any greater effect to the syllabus of a case decided by the highest court of a State and reported in the official reports of that court than is given thereto in the courts of the State. *Old Colony Trust Co. v. Omaha*, 100.

5. *Controlling effect of state court's construction of state statute.*

Decisions of the highest court of the State relating to such matters of local law as the construction of the constitution and statutes of the State and the powers of its municipalities, are controlling upon this court, so long as their application involves no infraction of rights secured by the Constitution of the United States. *Ib.*

6. *Following state court's construction of state statute as to constitutionality.*

This court follows the decision of the state court as to the constitutionality of a state statute conferring power on a Railroad Commission to establish intrastate rates. *Southern Pacific Co. v. Campbell*, 537.

7. *Scope of review when case up on question of jurisdiction only.*

When the case is here on a question of jurisdiction only, this court cannot pass upon questions which go to the merits. *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 247.

8. *As to showing unconstitutionality of law attacked.*

Where a statute is valid on its face, each person attacking it as depriving him of his property without due process of law must show it does so deprive him; he cannot rely on the fact that it deprives others of their property without due process of law. *Missouri Rate Cases*, 474.

See DISTRICT OF COLUMBIA, 2;
INTERSTATE COMMERCE, 23;
RATE REGULATION, 18, 19.

PREScription.

See CONSTITUTIONAL LAW, 9, 10;
PORTO RICO, 1.

PRESUMPTIONS.

See CORPORATIONS, 1;
LIBEL, 1;
RATE REGULATION, 43.

PRINCIPAL AND AGENT.

See LEVEES, 4.

PRIVILEGED COMMUNICATIONS.

See CONSPIRACY, 2;
LIBEL, 1, 2, 3.

PROPERTY RIGHTS.

1. *Right of individual owner to obstruct progress and development.*

An individual owner has no right to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible. *Jackson v. United States*, 1.

2. *Right of individual owner in protecting property from common natural danger to insist upon uniformity of methods by others.*

An individual owner protecting his own property from a common natural danger acquires no right thereby to insist that other owners or the Government shall adopt the same method or that they shall not adopt different methods for the protection of their respective properties or for the public good. *Ib.*

See CONSTITUTIONAL LAW, MUNICIPAL CORPORATIONS, 4, 5, 12; 8-12; PORTO RICO, 2; LEVEES, 3, 4, 6; RATE REGULATION, 28, 41, 42.

PUBLIC NUISANCE.

See EQUITY.

PUBLIC OFFICERS.

See LEVEES, 4.

PUBLIC SCHOOLS.

See LABEL, 2, 3.

PUBLIC UTILITY CORPORATIONS.

See CORPORATIONS, 1; MUNICIPAL CORPORATIONS, 4-7, 9, 17.

QUESTIONS OF LAW AND FACT.

When question one of law and not of fact.

Statements as to what the relation of the United States is to levee work on the Mississippi River and what the power of the Mississippi River Commission over all such work is by whomsoever performed are conclusions of law and not of fact. *Jackson v. United States*, 1.

See COURTS, 5.

RAILROADS.

See CARRIERS; INTERSTATE COMMERCE;
CONSTITUTIONAL LAW, 12; RATE REGULATION.

RATE REGULATION.

1. *Origin of.*

Regulation of railroad rates by the State began with railroad transportation. *The Minnesota Rate Cases*, 352.

2. *Federal powers in respect of relation of interstate to intrastate rates.*

The interblending of operations in the conduct of interstate and local business by interstate carriers, and the exigencies that are said to arise with respect to the maintenance of interstate rates by reason of their relation to intrastate rates, are considerations for the practical judgment of Congress. *Ib.*

3. *Federal powers in respect of relation of interstate to intrastate rates.*

When the situation becomes such that adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to such intrastate rates of interstate carriers as substantially affect interstate rates, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should supply. *Ib.*

4. *Federal control; effect of Interstate Commerce Act on rates for intrastate traffic.*

Neither by the original act nor by its amendment, has Congress sought to establish a unified control over interstate and intrastate rates; it has not set up a standard for intrastate rates or prescribed, or authorized the Federal commission to prescribe, either maximum or minimum rates for intrastate traffic. *Ib.*

5. *State power as to; scope of; limitation by Congress; necessity for actual exercise of Federal power.*

The authority of the State to prescribe what shall be reasonable charges for intrastate transportation is state-wide, unless it be limited by the exertion of the constitutional power of Congress with respect to interstate commerce and its instruments. As a power appropriate to the territorial jurisdiction of the State it is not confined to a part of the State, but extends throughout the State—to its cities adjacent to its boundaries as well as to those in the interior of the State. If this authority of the State be restricted, it must be by virtue of the actual exercise of Federal control and not by reason merely of a dormant Federal power, that is, one which has not been exerted. *Ib.*

6. *State power as to; effect of Interstate Commerce Act.*

Having regard to the terms of the Federal statute, the familiar range

of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding such authority, this court finds no foundation for the proposition that the Act to Regulate Commerce contemplated interference with the authority of the State to prescribe reasonable rates for the exclusively internal traffic throughout the extent of its territory. *Ib.*

7. *State power as to; effect of Interstate Commerce Act.*

The fixing of reasonable rates for intrastate transportation was left by the act where it had been found, that is, with the States and the agencies created by the States to deal with that subject. *Ib.*

8. *State power as to; validity of action by Minnesota.*

Under the established principles governing state action, Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction and not opposed to any action thus far taken by Congress. *Ib.*

9. *State power as to intrastate traffic; constitutional validity determinative of.*

The question involved is whether, in prescribing a general schedule of rates involving the profitableness of the intrastate operations of the carrier, taken as a whole, the State has superseded the constitutional limit by making the rates confiscatory. *Ib.*

10. *State power as to; interference with interstate commerce; validity of Missouri acts.*

These suits were brought to restrain the enforcement of the freight-rate and passenger-fare acts of the State of Missouri, passed in 1907. The question of interference with interstate commerce is the same as that presented in the *Minnesota Rate Cases*, ante, p. 352, and the decision is the same. *Missouri Rate Cases*, 474.

11. *State power as to; interference with interstate commerce; validity of Missouri acts.*

Minnesota Rate Cases, ante, p. 352, followed to effect that the legislative acts of Missouri establishing maximum rates for transportation wholly intrastate are not unconstitutional as an unwarranted interference with interstate commerce. *Ib.*

12. *State power as to intrastate rates.*

Minnesota Rate Cases, ante, p. 352, followed to effect that a state statute prescribing rates exclusively for intrastate traffic is within the power of the State to enact. *Chesapeake & Ohio Ry. Co. v. Conley*, 513.

13. *State power as to interstate rates.*

A state railroad commission has no power to fix interstate rates, and as in this case the state court has not construed an order of the state commission as relating to or affecting interstate rates this court does not so construe it. *Oregon R. R. & N. Co. v. Campbell*, 525.

14. *State power as to; interference with interstate commerce.*

Minnesota Rate Cases, ante, p. 352, followed to effect that an order of a state railroad commission relating wholly to rates on intrastate shipments is not an unconstitutional interference with interstate commerce. *Ib.*

15. *State power as to; effect of general charter provision to lay and collect tolls.*

A general charter provision, giving power to charge and collect tolls, necessarily implies that the charges shall be reasonable, and does not detract from the power of the State to prescribe reasonable rates. *Southern Pacific Co. v. Campbell*, 537.

16. *State power as to; validity of exercise under Constitution.*

Minnesota Rate Cases, ante, p. 352, followed to effect that an intrastate rate fixed by State Railroad Commission is not an unconstitutional interference with interstate commerce. *Allen v. St. Louis, I. M. & S. Ry. Co.*, 553.

17. *Confiscation; right of carrier to contest validity of rates on ground of.*

A carrier has the right to contest the validity of rates prescribed by a body clothed by the legislature with power to establish rates on the ground they are confiscatory, and this right is not impaired by putting the rates into effect if they prove to be confiscatory. *Ib.*

18. *Confiscation; effect of insufficiency of showing of.*

Minnesota Rate Cases, ante, p. 352, also followed to effect that where the proofs submitted by a carrier attacking rates as confiscatory are not sufficient to justify a finding that the rates are confiscatory, the bill should be dismissed. *Ib.*

19. *Confiscation; sufficiency of showing; enjoining enforcement of rates.*

The enforcement of an order of the State Railroad Commission prescribing rates for intrastate transportation will not be restrained at the instance of a carrier on the ground that the rates are confiscatory where the allegations of the bill are insufficient to show that the carrier would be deprived of just compensation in the business of intrastate transportation by virtue of the operation of the order. *Southern Pacific Co. v. Campbell*, 357.

20. *Confiscation; sufficiency of showing.*

Where the constitutional validity of state action is involved general estimates of division between interstate and intrastate business cannot be accepted as adequate proof to sustain a charge of confiscation. *The Minnesota Rate Cases*, 352.

21. *Confiscation; sufficiency of showing.*

In the cases of the Northern Pacific and Great Northern companies on the examination of estimates of value, and methods of apportionment, *held* that the proof is insufficient to justify a finding that the rates were confiscatory; and in each of those cases the decrees are reversed with instructions to dismiss the bill without prejudice. *Ib.*

22. *Confiscation; sufficiency of showing.*

In the case of the Minneapolis and St. Louis Railroad Company, *held*, in view of the special facts appearing, that the margin of error in the estimates and calculations was not sufficient to affect the result. The decree in that case, adjudging the rates to be confiscatory, is therefore affirmed with the modification that the State may apply to the court by bill or otherwise, as advised, for a further order or decree whenever it shall appear that by reason of a change in circumstances the rates fixed by the State's acts and orders are sufficient to yield to this company reasonable compensation for the services rendered. *Ib.*

23. *Confiscation; sufficiency of showing.*

Legislative acts of a State establishing maximum freight and passenger rates for wholly intrastate commerce will not be declared unconstitutional under the Fourteenth Amendment as confiscatory in the absence of clear and convincing proof as to the value of the property used by the carrier and on which returns are based. General evidence as to assessed valuations without showing the method of appraisement are insufficient, either as to value of property or apportionment of expenses between interstate and intrastate business. *Missouri Rate Cases*, 474.

24. *Classification of railroads; constitutionality.*

Classification in a rate-making statute of railroads less than fifty miles in length is not unreasonable and does not render the statute unconstitutional as violating the equal protection provision of the Fourteenth Amendment. (*Dow v. Beidelman*, 125 U. S. 680.) *Chesapeake & Ohio Ry. Co. v. Conley*, 513.

25. *Classification of railroads; constitutionality.*

As construed by the state court the statute of West Virginia of 1907 is not unconstitutional because the classification of railroads under fifty miles in length only applies to such roads as are not under the control, management or operation of other railroads. *Ib.*

26. *Classification of railroads; constitutionality.*

A classification excepting electric lines and street railways from a railroad rate statute is reasonable and proper and does not offend the equal protection clause of the Fourteenth Amendment. (*Omaha & Council Bluffs Railway Co. v. Int. Com. Comm.*, ante, p. 324.) *Ib.*

27. *Legislative discretion in.*

The rate-making power is a legislative power and necessarily implies a range of legislative discretion. *The Minnesota Rate Cases*, 352.

28. *Judicial determination of sufficiency of rates; right of carrier to.*

A state statute which does not permit a carrier to have the question of sufficiency of rates determined by a court of competent jurisdiction, and which imposes such conditions upon the appeal for judicial relief as works an abandonment of the right rather than face those conditions, is unconstitutional as depriving the carrier of its property without due process of law. (*Ex parte Young*, 209 U. S. 123, 147.) *Missouri Pacific Ry. Co. v. Tucker*, 340.

29. *Judicial interference with; when justified.*

The court should only override the decision of the body which has been given legislative authority to establish rates of transportation where the action of such body is of such an arbitrary character as to constitute an abuse of powers. *Southern Pacific Co. v. Campbell*, 537.

30. *Judicial interference with; separableness of penal and other provisions.*

Penal provisions of a state statute regulating railroad rates which are separable furnish no ground for the courts denying effect to the rates if the statute is otherwise valid. *Ib.*

31. *Carriers' rights against legislative caprice; constitutional protection.*

While the property of railroad corporations has been devoted to a public use, the State has not seen fit to undertake the service itself and the private property embarked in it is not placed at the mercy of legislative caprice, but rests secure under the constitutional protection which extends not merely to the title, but to the right to receive just compensation for the services given to the public. *The Minnesota Rate Cases*, 352.

32. *Suits to enjoin enforcement of rates; when some sustained and others dismissed.*

Where a number of different carriers bring separate suits to enjoin the enforcement of railway rates established by a state statute on the ground that the rates are unconstitutional as confiscatory, the bills can be sustained as to those carriers which actually prove that the rates are confiscatory as not yielding a return on their property, although dismissed as to other carriers which fail to offer clear and convincing proof to that effect. *Missouri Rate Cases*, 474.

33. *Estoppel of carrier to attack constitutionality of penal provisions of statute suspended during litigation.*

Where the state court has held that the carrier is exempted from the operation of the penalty clause of a rate-making statute during prosecution by it in good faith of a suit to determine the constitutionality of such statute, the carrier cannot attack the validity of the statute on the ground of its penal provisions. *Chesapeake & Ohio Ry. Co. v. Conley*, 513.

34. *Reasonableness of intrastate rates; determination where carrier does both interstate and intrastate business.*

Where a carrier does both interstate and intrastate business, to determine whether a scheme of maximum intrastate rates affords a fair return the value of the property employed in intrastate business and the rates prescribed must be considered separately, and profits and losses on interstate business cannot be offset. *The Minnesota Rate Cases*, 352.

35. *Valuation; basis of calculation in fixing rates.*

For fixing rates the basis of calculation of value is the fair value of the property of the carrier used for the convenience of the public. (*Smyth v. Ames*, 169 U. S. 466.) *Ib.*

36. *Valuation; basis of calculation in fixing rates.*

There is no formula for the ascertainment of the fair value of property

used for convenience of the public, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts. *Ib.*

37. *Valuation; basis of calculation in fixing rates.*

Assets and property of a carrier not used in the transportation business cannot be included in the valuation as a basis for rate making. *Ib.*

38. *Valuation; basis of calculation in fixing rates.*

Property of a railroad company cannot be valued for a basis of rate making at a price above other similar property solely by reason of the fact that it is used as a railroad, and increases in value over cost cannot be allowed beyond the normal increase of other similar property. *Ib.*

39. *Valuation for purposes of; considerations.*

In valuing the plant of a carrier for purpose of fixing rates there should be proper deductions for depreciation. *Ib.*

40. *Valuation for purposes of; apportionment where both interstate and intrastate business.*

Minnesota Rate Cases, ante, p. 352, followed, disapproving the establishment of values of property used in interstate and intrastate business by apportionment based on the gross revenue received from each class of business. *Missouri Rate Cases*, 474.

41. *Overcharging; penalties for; power of State to fix amount of liquidated damages.*

While it may be within the power of the State to impose double or treble damages on a carrier for overcharging transportation rates, it is beyond its power to impose a fixed amount as liquidated damages in every case regardless of, and as a general rule many times in excess of, the actual damages. To do so would deprive the carrier of its property without due process of law in violation of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Tucker*, 340.

42. *Overcharging; penalties for; invalidity of Kansas law of 1905, fixing amount of liquidated damages for.*

That part of the statute of Kansas of 1905 establishing maximum rates for transportation of oil, gasoline, etc., which fixes \$500 as liquidated damages in favor of the shipper for any excess charge regardless of the amount thereof is so arbitrary and oppressive as to render it unconstitutional under the Fourteenth Amendment as taking the property of the carriers without due process of law. *Ib.*

43. *Presumption as to validity; right of carriers to resort to courts to determine validity.*

Rates that a railroad company may charge for transportation as fixed by the legislation of a State are presumptively valid, but not conclusively so; and the company is entitled to have the question of whether the prescribed rates are confiscatory and therefore deprive it of its property without due process of law in appropriate judicial proceedings. *Ib.*

44. *Operation of order of state commission; determination of.*

Whether an order of the state commission governs particular shipments depends upon whether the traffic is interstate or intrastate, which must be determined by the facts in each case. The question cannot be determined in advance by general decree. *Oregon R. R. & N. Co. v. Campbell*, 525.

45. *Minnesota acts; validity determined.*

These appeals involve the validity of the orders of the Railroad and Warehouse Commission; and the legislative acts, of the State of Minnesota prescribing maximum rates for freight, and a maximum fare of two cents a mile for passengers. The rates relate to traffic exclusively between points within the State. It was contended, however, that as applied to cities on the State's boundary, or to places within competitive districts crossed by the state line, the rates disturbed the relation previously existing between interstate and intrastate rates, thus imposing a direct burden upon interstate commerce and creating discriminations as against localities in other States. The rates were also assailed as confiscatory. The rates are sustained as to the Northern Pacific and Great Northern companies. In the case of the Minneapolis and St. Louis Railroad Company, the rates are held to be confiscatory in view of the particular facts shown with respect to that road. *The Minnesota Rate Cases*, 352.

See CONSTITUTIONAL LAW, 12; JURISDICTION, D;
INTERSTATE COMMERCE; PLEADING, 2;
PRACTICE AND PROCEDURE, 6.

RATES.

See CARRIERS;
INTERSTATE COMMERCE, 14, 15, 16, 25;
RATE REGULATION.

REAL PROPERTY.

Record title; purchaser bound by defects and infirmities in.

Wherever registry laws are in force, the rule is that a purchaser takes

subject to any defects and infirmities that may be ascertained by reference to the chain of title as spread on the record, and this includes invalidity of an order on which title is based. *Ochoa v. Hernandez*, 139.

See CONSTITUTIONAL LAW, 9, 10, 11.

REBATES.

See INTERSTATE COMMERCE, 13, 16-19.

REGISTRATION OF INSTRUMENTS.

See PORTO RICO, 1;

REAL PROPERTY.

REMEDIAL STATUTES.

See CIVIL RIGHTS ACT, 3.

REMEDIES.

See RIPARIAN RIGHTS, 3.

REPORTS.

See PRACTICE AND PROCEDURE, 4.

RESERVED POWERS.

See COMMERCE;

STATES, 1, 2;

RES JUDICATA.

1. *Scope of bar.*

If the parties in the former action be the same as in the present, every matter and question of fact necessarily involved in the consideration and determination of the former issue is conclusive upon the present. (*Southern Pacific Railroad v. United States*, 168 U. S. 1, 48.) *Nalle v. Oyster*, 165.

2. *Effect of judgment in action for mandamus as bar to same question in action of libel between same parties.*

A judgment denying the petition in an action for mandamus to compel reinstatement of a public school teacher in which the defendants, members of the Board of Education, pleaded that the petitioner was not sufficiently qualified as a teacher and the court held this was justification of the dismissal is *res judicata* as to that question in a suit for libel subsequently brought by the petitioner against the same defendants for the statement made in such pleading. *Ib.*

3. *Effect of judgment as, against one not party to suit.*

A judgment against a corporation construing its franchise is not *res judicata* as against a mortgagee who was not a party to the suit and whose rights were acquired prior to the commencement of the suit in which the judgment was entered. *Old Colony Trust Co. v. Omaha*, 100.

4. *Limitation of bar where judgment makes opinion part of record.*

Where the judgment itself makes the opinion a part of the record, the bar of the judgment is confined to those questions to which the opinion expressly declares the litigation was limited. *Owensboro v. Cumberland Telephone Co.*, 58.

RIPARIAN RIGHTS.

1. *Use of running waters under law of Arizona; relative rights of appropriators.*

In Arizona, by statute, all rivers, streams, and running waters are declared public, and may be used for purposes of milling, mining and irrigation. The first appropriator is first in right to the extent necessary for his purposes; and neither the user for mining purposes nor the user for agricultural purposes is placed upon a higher plane than the other. *Arizona Copper Co. v. Gillespie*, 46.

2. *Use of running waters; relative rights of users; effect of magnitude or importance of conflicting interests.*

Where users of waters are placed, as in Arizona, upon the same plane, the rights of lesser users are not subordinated to those of greater users; nor is a wrong done by one to the other condoned because of the magnitude or importance either of the public or the private interests of the former. *Ib.*

3. *Remedies for wrongful injury to.*

Where one of several users of waters is wrongfully injuring the others there is a remedy either at law or in equity; the latter depending upon circumstances including the comparative injury of granting or refusing an injunction. *Ib.*

4. *Limitation on right of appropriator of water as to quantity and quality.*

The limitation of necessary use on the right of an appropriator of water applies to quality as well as quantity; and the right to use necessary water does not include the right to so destroy the quality of all the water not used as to continuously injure the property of the other appropriators. *Ib.*

5. *Application of maxim sic utere tuo ut alienum non lædas.*

The maxim *sic utere tuo ut alienum non lædas* applies in Arizona and elsewhere to the use of waters by one appropriator as against another. *Ib.*

RIVERS.

See LEVEES;

RIPARIAN RIGHTS.

STATES.

1. *Effectiveness of laws; effect of paramount power of Congress.*

In the absence of Federal action, effect may not be denied to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power. *The Minnesota Rate Cases*, 352.

2. *Powers reserved to; effect of incidental involution of interstate commerce.*

There remains to the States the exercise of the power appropriate to their territorial jurisdiction in making suitable provision for local needs. The State may provide local improvements, create and regulate local facilities, and adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. *Ib.*

3. *Powers reserved to; when power of Congress paramount.*

Where matters falling within the state power, as above described, are also by reason of their relation to interstate commerce within the reach of the Federal power, Congress must be the judge of the necessity of Federal action; until Congress does act, the States may act. *Ib.*

See COMMERCE;

INTERSTATE COMMERCE;

LEVEES;

MUNICIPAL CORPORATIONS, 1, 2,

3, 18;

RATE REGULATION.

STATUTE OF LIMITATIONS.

Modification of; to what extent permissible.

Statutes of limitation may be modified by shortening the time which is still running but only so that a reasonable time still remains for commencement of an action before the bar takes effect. *Ochoa v. Hernandez*, 139.

See CONSTITUTIONAL LAW, 9, 10;

MUNICIPAL CORPORATIONS, 9-12, 14.

STATUTE OF WESTMINSTER.

See DISTRICT OF COLUMBIA, 1, 2.

STATUTES.

A. CONSTRUCTION OF.

1. *Constitutionality; intent of Congress as to separableness of provisions.*

Where the greater part of a statute is unconstitutional as beyond the power of Congress, the question for the court to determine as to the part which is constitutional is whether it was the intent of Congress to have that part stand by itself—if not, the whole statute falls. *Butts v. Merchants' Transportation Co.*, 126.

2. *Debates in Congress not available in construing act.*

The meaning of the Act to Regulate Commerce and whether it applies to street railways carrying passengers over a state line cannot be determined from statements made in Congress during the debates on the bill; the act must be interpreted by its own terms as looked at in the whole. *Omaha Street Ry. Co. v. Interstate Com. Comm.*, 324.

3. *Reports of committees and language of members; availability for purpose of construction.*

While they may be looked at to explain doubtful expressions in a statute, not even formal reports, much less the language of a member of the committee can be resorted to for the purpose of construing a statute contrary to its plain terms. *Pennsylvania R. Co. v. International Coal Co.*, 184.

See CIVIL RIGHTS ACT;

INTERSTATE COMMERCE, 2, 3, 4;

PRACTICE AND PROCEDURE, 5, 6.

B. STATUTES OF THE UNITED STATES.

See ACTS OF CONGRESS.

C. STATUTES OF THE STATES AND TERRITORIES.

See LOCAL LAW.

STIPULATION OF COUNSEL.

See PRACTICE AND PROCEDURE, 2, 3.

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See INTERSTATE COMMERCE, 4;

RATE REGULATION, 26.

STREETS AND HIGHWAYS.

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INDEX.

SUPPLEMENTAL BILL.

See PLEADING, 2.

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See CONSTITUTIONAL LAW, 1;

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See CONSTITUTIONAL LAW, 9, 10, 11;

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See CARRIERS;

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CONSTITUTIONAL LAW, 12;

RATE REGULATION.

UNITED STATES.

See LEVEES.

WATER COMPANIES.

See CONSTITUTIONAL LAW, 4;

MUNICIPAL CORPORATIONS, 2, 15, 17.

WATERS.

See EQUITY, 1;

LEVEES;

RIPARIAN RIGHTS.

WORDS AND PHRASES.

"*Due process of law*" (see Constitutional Law, 8). *Ochoa v. Hernandez*, 139.

"*General electric light business*" as used in municipal franchise (see Electric Light Companies). *Old Colony Trust Co. v. Omaha*, 100.

"*Railroad*" as used in Interstate Commerce Act of 1887 (see Interstate Commerce, 3). *Omaha Street Ry. Co. v. Interstate Com. Comm.*, 324.

WRIT AND PROCESS.

See APPEAL AND ERROR;

JURISDICTION;

MANDAMUS.